

August 05, 2013

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: August 4, 2013

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
CARL ALEXANDER WESCOTT and) No. 12-30143DM
MONETTE ROSEMARIE STEPHENS,) Chapter 7
Debtors.)

AMENDED MEMORANDUM DECISION ON MOTION FOR SANCTIONS

I. INTRODUCTION

Janina M. Hoskins, Trustee ("Trustee"), has moved for sanctions against Sheila Gropper Nelson, Esq. ("Nelson") due to spoliation of evidence. Because the court is of the view that Nelson hampered enforcement of a court order, the Trustee's motion will be granted and Nelson will be sanctioned in the sum of \$2,500.¹

¹ On May 22, 2013, the court issued its Memorandum Decision On Motion For Sanctions, and on the same day its Order Imposing Sanctions. Nelson filed a timely Motion To Alter and Amend Imposition of Sanctions ("Motion to Reconsider") on June 4, 2013, and Trustee opposed. Following argument on July 12, 2013, the court took the motion under advisement. The Motion to Reconsider is DENIED in that the Order Imposing Sanctions will not be altered or amended, and GRANTED to the extent reflected in this Amended Memorandum Decision.

1 II. DISCUSSION²

2 On August 27, 2012, the court entered an Order Re: Debtor's
3 Motion To Quash Orders For Examination ("Motion To Quash Order")
4 (Docket No. 200). In that order the court specifically directed
5 debtors Carl Alexander Wescott ("Wescott") and Monette Rosemarie
6 Stephens ("Stephens") to produce for inspection and photocopying
7 documents identified in a motion for Rule 2004 examination (Docket
8 No. 65) and in a July 13, 2012 Order For Examination Pursuant To
9 Bankruptcy Rule 2004 (Docket No. 155). The Motion To Quash Order
10 followed a hearing on August 22, 2012, on a motion filed by Nelson
11 on behalf of Wescott to quash or limit the July 13, 2012 Order.
12 On that same date the court held a continued hearing on Nelson's
13 motion to withdraw as Wescott's counsel.

14 At that hearing the court assured Nelson that she was not
15 responsible for Wescott's own behavior, and that she would be
16 relieved as Wescott's counsel, but would need to continue to be
17 his representative to complete the necessary document production.

18 Notwithstanding that admonition, when Nelson complained that
19 Wescott had informed her that she had no authority over the
20 records that were his or those of entities that he controlled, the
21 court stated that Nelson would be required to act as Wescott's
22 counsel "at least until this document production is done with."
23 (Transcript of August 22 hearing at 40:17-19).

24 Five days later, on August 27, 2012, Nelson received an e-
25 mail from Wescott demanding return of three boxes of records that
26 were then in Nelson's possession. Disregarding the Motion To

27
28 ² The following discussion constitutes the court's findings
of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 Quash Order and the continued effectiveness of material provisions
2 of the July 13, 2012 Order, as well as the colloquy at the August
3 22 hearing, Nelson returned the three boxes of records to
4 Wescott's agent.

5 The present motion followed, and as part of her defense, as
6 set forth in her Declaration In Support Of Opposition To Motion
7 For Sanctions (Docket No. 289), Nelson stated that "I did not
8 believe that I could withhold materials from a former client."

9 Trustee's motion appears to be premised on the court's
10 discretion to sanction parties and their counsel who cause
11 spoliation of evidence, citing Leon v. IDX Sys. Corp., 464 F.3d
12 951 (9th Cir. 2006). That case relied on the court's inherent
13 powers for such a sanction, and the Trustee cites those same
14 inherent powers as well as 11 U.S.C. § 105.

15 Leon cites Primus Auto Fin. Services, Inc. v. Batarse, 115
16 F.3d 644 (9th Cir. 1997). Primus holds that before awarding
17 sanctions, the court must make an express finding that the
18 sanctioned party's behavior constituted or was tantamount to bad
19 faith. A party demonstrates bad faith by delaying or disrupting
20 the litigation or hampering enforcement of a court order. Primus,
21 115 F.3d at 649 (emphasis added).

22 Further, a party's destruction of evidence qualifies as
23 willful spoliation if the party has "some notice that the
24 documents were potentially relevant to the litigation before they
25 were destroyed." United States v. Kitsap Physicians Serv., 314
26 F.3d 995, 1001 (9th Cir. 2002). The motion to quash that Nelson
27 filed on Wescott's behalf, coupled with the content of the Motion
28 to Quash Order and the discussions with the court at the August

1 22, 2012 hearing, establish that she knew that the three boxes of
2 records were relevant to the Trustee's investigations in this
3 Chapter 7 case. Nelson's release of those boxes of records to
4 Wescott under the circumstances where he was resisting the
5 Trustee's efforts, plainly and painfully constitute Nelson's
6 wilful spoliation of evidence the Trustee was entitled to.

7 In the Motion to Reconsider Nelson admits to her lapse in
8 judgment, and that she should have sought further clarification
9 when presented with the conflicting demands of her former client
10 and the Trustee who was seeking to enforce the court's orders.

11 From the foregoing the court concludes that Nelson's action,
12 while not in bad faith per se, had the same effect in that she
13 frustrated the enforcement of the court's July 13, 2012 Order and
14 the Motion To Quash Order. Her excuse that Wescott was entitled
15 to the records is undermined by the fact that those records are
16 property of the estate under 11 U.S.C. § 541 to which the Trustee
17 is entitled under 11 U.S.C. § 542(a). Nelson, holding herself out
18 as a bankruptcy expert, knew this. This adverse effect on the
19 Trustee's administration had the same effect - was "tantamount"³
20 (Primus, 115 F. 3d at 649) - to an act in bad faith.

21 Had Wescott asserted any undue pressure or threat to Nelson,
22 perhaps surrender of the three boxes of records would have been
23 explainable. Unfortunately, Nelson passed up an opportunity
24 either to copy the documents so that both the Trustee and Wescott
25 could have their content, or in the alternative, to seek

27 ³ See definition of "tantamount" as "equivalent in value,
28 significance or effect" at www.merriam-webster.com/dictionary/tantamount (Emphasis added).

1 instructions from the court. She did neither, thus leaving the
2 Trustee without the benefit of knowing what was in the three boxes
3 of records that escaped through Nelson's conduct. The court
4 expects more from Nelson. Her conduct, while perhaps
5 understandable, was entirely unacceptable.

6 While it is true that ultimately the Trustee recovered
7 numerous boxes of records of Wescott and Stephens, Nelson has not
8 demonstrated that the same three boxes, intact, were ultimately
9 obtained by the Trustee. Thus, the relevance of the missing
10 documents cannot be clearly ascertained because they no longer
11 exist, and Nelson cannot assert any presumption of the relevance
12 as to those destroyed documents. Alexander v. Nat'l Farmers Org.,
13 687 F.2d 1173 (8th Cir. 1982). Nor can she be exonerated on her
14 belief, without persuasive proof, that nothing was in fact lost.

15 What remains for the court to do determine an appropriate
16 sanction. Trustee asked for \$8,500 in attorneys' fees, all of
17 which were incurred by Trustee's counsel between April 2, and May
18 10, 2013, in discussing with the Trustee her decision to file the
19 motion for sanctions, performing research and drafting, making
20 revisions, consideration of Nelson's opposition, preparation of
21 the reply, and attendance at the hearing on the motion. The
22 Trustee has not pointed to any specific dollar amount attributable
23 to the loss of the records, as distinguished from the amount
24 attributable to the motion to seek redress for that loss.

25 Under the circumstances the court will not award \$8,500.
26 Leon instructs that monetary sanctions must be "reasonable."
27 Leon, 464 F.3d at 951, citing Brown v. Baden (In re Yagman), 796
28 F.2d 1165 (9th Cir.), as amended by 803 F.2d 1085 (1986), cert.

1 denied, 108 S.Ct. 450 (1987). The court determines that a
2 reasonable sanction for Nelson's inexcusable behavior is \$2,500.⁴

3 **END OF MEMORANDUM DECISION**
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26 ⁴ Nelson, in her Motion To Reconsider, asks the court to
27 reduce that amount and Trustee asks that it be increased to the
28 \$8500 she requested initially. The court is mindful that Nelson
may need to report this amount to the State Bar, but that fact
does not justify a reduction under the circumstances.